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9
10 Attorney for Defendant
11 CHERYL PEREZ-CASTANEDA

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18 UNITED STATES DISTRICT COURT
19
20 CENTRAL DISTRICT OF CALIFORNIA

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28 UNITED STATES OF AMERICA,) CASE NO. CR No. 18-172-GW
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30 Plaintiff,) **DEFENDANT PEREZ-CASTANEDA'S**
31) **POSITION OF THE PARTIES RE:**
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2 **MEMORANDUM OF POINTS AND AUTHORITIES**
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5 **I**
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8 **INTRODUCTION**
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11 The Defendant, CHERYL PEREZ-CASTANEDA, has pleaded
12 guilty to Count 1, Conspiracy to violate the RICO statute
13 (18 U.S.C. 1962(d)), and Count 13, Aiding and Abetting the
14 Possession, Use, or Carrying a Firearm in relation to a
15 Crime of Violence, namely an Attempted Carjacking. (18
16 U.S.C. 924c). In this case, the Defendant pleaded guilty,
17 but withdrew the plea due to a mistake in the First Plea
18 Agreement, and then negotiated a different Second Plea
19 Agreement, and again pleaded guilty a second time.
20

21 In the First Plea Agreement, the parties thought
22 that the 924c firearms charge would only require a
23 consecutive sentence if the second crime charged was a crime
24 of violence. In this case, RICO Conspiracy is not a crime
25 of violence. See, United States v Davis, 139 S.Ct. 2319
26 (2019). Thus, the Defendant believed that she could receive
27 concurrent sentences for the RICO Conspiracy and the 924c
28 firearms charges, making it possible for the Defendant to
receive ten years on each count running concurrently, for a
total sentence of ten years.

1 The Probation Officer in his Letter correctly
2 noted that the mandatory sentence for the 924c firearms
3 charge must be imposed consecutively to any other criminal
4 charge and is not limited to being consecutive to crimes of
5 violence. Prob. Letter, p. 6. Section 924 (c) (1) (D) (ii)
6 provides that "no term of imprisonment imposed on a person
7 under this subsection shall run concurrently with any other
8 term of imprisonment imposed on the person, including any
9 term of imprisonment imposed for the crime of violence or
10 drug trafficking crime during which the firearm was used,
11 carried, or possessed."

12 At that point, the Defendant had grounds to
13 withdraw her guilty plea. However, the Defendant did not
14 wish to proceed to trial and wanted to resolve her case.
15 The Defendant and the Government negotiated a Second Plea
16 Agreement. She pleaded guilty to the same two charges, RICO
17 Conspiracy and the 924c firearms charge. The agreement
18 expressly advised that the sentence on the 924c firearms
19 charge required a mandatory minimum consecutive sentence of
20 ten years. The Government agreed to recommend that the
21 Defendant be sentenced to a total term of imprisonment on
22 all counts of no more than 180 months. Revised Plea
23 Agreement, p. 2, para. 3(e).
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II

UNDER NINTH CIRCUIT CASE LAW, SPECIFIC PERFORMANCE OF THE PLEA AGREEMENT MAY BE REQUIRED IN CASES WHERE WITHDRAWAL OF THE PLEA WOULD EXPOSE THE DEFENDANT TO AN EXTREMELY LONG SENTENCE AFTER A TRIAL

In the First Plea Agreement, the Defendant tried to negotiate a plea agreement that would avoid her being given a mandatory consecutive ten years for the 924c firearms charge. The 924c firearms charge alleged that the Defendant aided and abetted in a co-defendant's discharge of a firearm during the crime of Attempted Carjacking. The Defendant mistakenly thought that by not pleading guilty to the Attempted Carjacking charge, the 924c firearms charge could run concurrently to the RICO Conspiracy charge.

18 The First Plea Agreement was signed and the
19 Defendant pleaded guilty mistakenly thinking that it was at
20 least possible that she could receive concurrent ten year
21 sentences on both the RICO Conspiracy and the 924c charge.
22
23 The First Plea Agreement and first guilty plea have both
24 been vacated. Faced with the unacceptable alternative of
25 going to trial on the entire indictment, the Defendant
26 entered into the Second Plea Agreement and pleaded guilty
27 again to Counts 1 and 13.

In the Second Plea Agreement it was made

1 clear that the 924c firearms sentence of ten years must be
2 imposed consecutively to the sentence on the RICO
3 Conspiracy. In an effort to reach an agreement in
4 negotiating the Second Plea Agreement, the Government has
5 agreed to recommend that the Defendant be sentenced to a
6 total term of imprisonment on all counts of no more than 180
7 months.

8 The Defendant asks the Court to sentence the
9 Defendant consistent with the expectations of the parties at
10 the time that the First Plea Agreement was entered into.
11 Under the original plea agreement, the Defendant had a right
12 to ask the Court to sentence her concurrently on the two
13 crimes and receive a total sentence of 120 months or
14 10 years. This Court could sentence the Defendant in such a
15 way that both takes into consideration the original mistaken
16 expectations of the parties and the legal requirement of
17 imposing a consecutive firearms sentence.

18 The Defendant asks the Court to sentence her to 1
19 month on Count 1 plus a consecutive sentence of 120 months
20 on Count 13, for a total sentence of 121 months. Such a
21 sentence would be consistent with the First Plea agreement
22 and the understanding of the parties at the time the First
23 Plea agreement was signed. It would necessarily require the
24 Court to grant a downward departure or variance to 1 month
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1 on the sentence on Count 1, RICO Conspiracy. Such a
2 variance could be justified based on the legal principles
3 related to specific performance of plea agreements.
4

5 The United States Supreme Court has stated that
6 "[w]hen a plea rests in any significant degree on a promise
7 or agreement of the prosecutor, so that it can be said to be
8 part of the inducement or consideration, such promise must
9 be fulfilled." Santobello v New York, 404 U.S. 257, 262
10 (1971). In Buckley v. Terhune, 441 F.3d 688, 694 (9th Cir.
11 2006) (en banc), the Ninth Circuit stated that "Under
12 Santobello v. New York, 404 U.S. 257, 261-62, 92 S. Ct. 495,
13 30 L. Ed. 2d 427 (1971), a criminal defendant has a due
14 process right to enforce the terms of his plea agreement."
15

16 In Cuero V Cate, 827 F. 3d 879 (9th Cir. 2016) the
17 defendant entered a guilty plea under plea a agreement that
18 promised him a sentence of 14 years, 4 months. Before
19 sentencing, the prosecutor filed a prior strike under the
20 Three Strikes Law which doubled the sentence. The state
21 court judge allowed the prosecutor to seek the higher
22 sentence and refused to sentence the defendant according to
23 the plea agreement. The federal court ordered the plea
24 agreement to be honored and to allow the defendant to
25 receive the agreed upon sentence set forth in the plea
26 agreement. Specifically, the Court held that allowing the
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28

1 defendant to withdraw the plea was no remedy because it
2 would expose the defendant to an extremely long potential
3 sentence after conviction at a trial. The Court stated:
4
5

6 Moreover, that the state court permitted Cuero
7 to withdraw his plea did not "repair the harm"
8 caused by the prosecutor's breach. To the
9 contrary: It exposed Cuero to the risk of going to
10 trial and receiving an indeterminate 64 years to
11 life sentence. This is hardly the "remedy" Cuero
12 would have elected had he properly been given a
13 choice. That Cuero was ultimately able to
14 "'bargain'" for an indeterminate 25 years to life
15 sentence does not alter the analysis; the state
16 could not have lawfully pursued an indeterminate
17 life sentence in the first place if it had not
18 been allowed to breach the plea agreement. Again,
19 Cuero had performed his part of the agreement by
pleading guilty to the two felony charges,
admitting a single prior strike, and conceding his
four prison priors, giving the government the
bargain it sought. Because Cuero had already
performed, "fundamental fairness demands that the
state be compelled to adhere to the agreement as
well." (citation omitted). Cuero is therefore
entitled to the benefit of his original bargain: a
maximum sentence of 14 years, 4 months in prison.
(827 F. 3d at 891.)

20
21 Although the Defendant Perez has now enter into an
22 amended plea agreement, the amended agreement is harsher
23 than the original agreement. The only way to get
24 the Defendant back to where she was at the time of the
25 original plea agreement is to sentence her to 1 month on
26 Count 1 and a consecutive 120 months on Count 13, for a
27 total sentence of 121 months.
28

1 The Government may argue that the case of Cuero v
2 Cate was reversed by the United States Supreme Court in
3 Kernan v Cuero, 138 S. Ct. 4 (2017). But the reversal was
4 on the grounds that the state court decision denying Cuero
5 habeas relief was not a decision that was an unreasonable
6 application of federal constitutional law as decided by the
7 United States Supreme Court, as required by the AEDPA.
8 After remand to the Ninth Circuit, Circuit Judge Wardlaw
9 stated that the state court could reconsider whether Cuero
10 had been denied due process by the refusal to grant
11 specific performance of the plea agreement because the
12 Supreme Court had only held that "the state court is not
13 required to do so by clearly established Supreme Court law."
14 Cuero v Kernan, 913 F3d 1157, 1158 {9th Cir. 2019}.

15 In Defendant Perez Castaneda's case, the
16 limitations of AEDPA do not apply and the original
17 discussion of specific performance of plea agreements in
18 Cuero v Cate is still an accurate summary of the law.
19 Lastly, the Defendant is not saying she was promised a
20 concurrent sentence of 10 years. She is only saying that
21 she had a realistic chance of receiving no more than 10
22 years under the original plea agreement. She may still have
23 that chance but it may be more difficult under the Second
24 Plea Agreement.

III

THERE ARE SEVERAL MITIGATING FACTORS THAT WOULD WARRANT A SENTENCE OF NO MORE THAN TEN YEARS IN THIS CASE

A. Post Offense Rehabilitation

The Defendant was arrested on May 3, 2018. This
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was based on an Indictment that alleged the Defendant was
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committing crimes during 2013. The Overt Acts in the
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Indictment allege that the Defendant was collecting tax
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money in 2012 and 2013. The alleged assault in the jail
11
occurred in 2013 and the attempted carjacking occurred in
12
2013. Thus, by the time of her arrest, five years had
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passed since the Defendant was actively involved in criminal
14
conduct.

17 By 2018 and the day of her arrest, the Defendant
18 had removed herself from the criminal activity that she had
19 been involved in. She was living with her two daughters and
20 was taking care of her five grandchildren. Her sole source
21 of income was her disability check from the government. She
22 had no involvement in criminal activity in 2018 at the time
23 of her arrest. On her own, she had rehabilitated herself.

In her letter to the Court, she writes that after suffering all the losses and deaths in her life, she gave in to stress and depression. It was during that time that she made her biggest mistakes and got involved in criminal

1 behavior. However, several years before her arrest, she
2 "gave her life to God." She began attending church services
3 with her daughters and became "closer to God than I've ever
4 been." She describes herself as "a changed person."
5 Defendant's Letter.

6 She has attended numerous classes while in custody
7 awaiting resolution of her case. The certificates of
8 completed class work are attached as exhibits to this brief.
9 Also attached are some of her excellent work records at
10 MDCLA. Based upon all of the these, the Defendant asks the
11 Court to consider her post-offense rehabilitation as a
12 mitigating factor in her case. See, Pepper v United States,
13 562 U.S. 476 (2011) [A court may consider post-offense
14 rehabilitation as a mitigating factor].

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16
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18 **B. The Tragic Loss of Her Two Children**

19 In 2013, the Defendant suffered the loss of two of
20 her grown children. Both were killed in violent
21 confrontations.

22 In March of 2013, the Defendant's daughter, Sonia
23 Castaneda-Montoya, age 28, was shot and killed by the police
24 while she was standing in the driveway of a motel. The
25 police claimed that she had a gun, but no gun was found in
26 her possession. The City of Pomona settled a lawsuit over
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28

1 the death of Sonia because the facts of the case did not
2 justify the shooting. The Defendant was devastated by the
3 sudden death of her daughter. The Defendant suffered a
4 stroke and was hospitalized for three days. PSR., p. 20,
5 par. 130.

6 In December of 2013, the Defendant's son, Fred
7 Aguirre, age 23, was shot and killed by a man with whom he
8 had an ongoing dispute. Although the man who killed her son
9 was arrested by the police, he was released and never
10 charged because the police decided the man acted in self
11 defense. After the loss of two children in one year, the
12 Defendant suffered a deep depression. PSR., p. 20, par.
13
14 131.

15 The Court should take these tragic deaths into
16 consideration when sentencing the Defendant. She has
17 suffered terribly as a result of the tragic deaths of her
18 children. See, United States v Collington, 461 F. 3d 805
19 (6th Cir. 2006) [Mitigating factors considered were that the
20 defendant's father was murdered when defendant was 9 years
21 old and his mother died soon thereafter].

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23
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25 **C. The History of Being a Victim of Domestic Violence**

26 The fact that a defendant has been a victim of
27 domestic violence is a mitigating factor that a Court may
28

1 consider at the time of sentencing. United States v Lopez,
2 938 F. 2d 1293, 1298 (D.C. Cir. 1991) [Exposure to domestic
3 violence may be considered as a mitigating factor]. In this
4 case, the Defendant was a victim of severe domestic violence
5 during her first marriage.
6

7 Her husband, Fred Aguirre, was physically abusive,
8 causing injuries on many occasions. Her husband used heroin
9 and was in and out of prison during their relationship. She
10 eventually left him because she "was tired of being hit."
11 PSR., p. 19, par. 125.
12

13 Her second husband, Viviano Perez, was also a
14 heroin addict. He failed to provide the Defendant with a
15 stable home and income. As a result, the Defendant and her
16 husband became homeless for two years and her children had
17 to live with various relatives. They lived for a time in
18 her mother's garage. PSR., p. 19, par. 128.
19

20 In January of 2012, Viviano passed away from a heart
21 attack. When he was alive, Viviano collected gang taxes for
22 co-defendant, Michael Lerma. PSR., p. 19, par. 127, 129.
23 It was shortly after his death that the Defendant started
24 becoming involved in the same activity, undoubtedly
25 motivated by her extreme poverty and her husband's bad
26 influence on her during his lifetime.
27
28

1 **D. A Prior Addiction to Drugs**

2 A person's addition to drugs is generally
3 considered to be a mitigating factor in federal sentencing.
4 It is part of the "history and characteristics of the
5 defendant" within the meaning of 18 U.S.C. 3553(a)(1).
6

7 United States v Hendrickson, 25 F.3d 1166 (N.D. Iowa 2014).

8 In this case, the Defendant became involved with
9 using drugs through her two husbands. She used PCP with her
10 first husband, Fred Aguirre, for ten years. She used
11 methamphetamine with her second husband, Viviano Perez,
12 while she was homeless. After that, she used opiates and
13 pain medication on a daily basis. PSR, p. 21-22, par. 145-
14 148.

15 An addiction to drugs frequently results in a
16 person being unable to control their impulses and causes
17 them to make poor judgments. All of the Defendant's poor
18 choices, that she made in this case, coincided with her
19 addiction and use of drugs.

20 **E. Strong Family Support and Involvement in Religion**

21 The Defendant has strong family support. Angela
22 Rocha is the sister of the Defendant. She is a Pastor. She
23 was instrumental in helping the Defendant change her life
24 and turn toward religion. She writes that "Cheryl had
25

1 turned her life over to Jesus Christ 8 years ago, her life
2 was a total transformation, going to church [and] being
3 involved in the Women's Ministry." "Cheryl has had a change
4 in life."

5 Her brother in law, Jimmy Rocha, is also a Pastor.
6 He writes that "Becoming a better Mother and Grandmother,
7 Cheryl began to draw her faith closer to God, and changed
8 the direction of her life, her positivity and investment in
9 her family." Patty Nides is another sister of the
10 Defendant. She writes that "Cheryl for the last 8 years has
11 been involved in the church and was a mentor to her children
12 and grandchildren." She states that "I feel that Cheryl
13 has changed her life [and] grows as she found worship and
14 prayer to guide her in life."

15 In her letter to the Court, the Defendant
16 acknowledges the support she has received from her family.
17 With the help of her sister, the Defendant has turned to
18 religion to help her change her life. At sentencing, it is
19 appropriate for the Court to consider the Defendant's family
20 circumstances to the extent that they may warrant a lesser
21 sentence. See, United States v Menyweather, 447 F.3d 625,
22 634 (9th Cir. 2006).
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IV

THE GUIDELINE CALCULATIONS FOR RICO CONSPIRACY SHOULD NOT INCLUDE INCREASES FOR VICTIM RESTRAINT AND AGGRAVATED ROLE IN THE OFFENSE AND THE C.V. MURDER CONSPIRACY SHOULD NOT BE A PART OF THE DEFENDANT'S RELEVANT CONDUCT

The Probation Report recommends a 2 level increase
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in the offense level for physical restraint of a victim
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under Guidelines 3A1.3, based on Carlos Gonzalez handcuffing
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victim C.V. PSR, p. 14, para. 91. The report also
11
recommends a 3 level increase in the offense level for an
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aggravated role in the offense under Guidelines 3B1.1, based
13
on the Defendant's directing co-defendants to commit
14
criminal acts and authorizing the murder of C.V. PSR, p.
15
16
17

18 The Defendant objects to these upward adjustments
19 because they are not supported by the facts. By the same
20 token, the Defendant objects to the inclusion of the
21 Conspiracy to Murder C.V. as a part of the Defendant's
22 relevant conduct. PSR, p. 11-12, para. 72-77.

24 The Probation Officer failed to recognize that in
25 the Defendant's Factual Basis section of her Plea Agreement
26 with the Government, the Defendant did not admit any facts
27 related to the Conspiracy to Murder C.V. Revised Plea
28 Agreement, pp. 8-14. Although an early version of the plea

1 agreement contained those facts, they were removed as a part
2 of the plea negotiations. They were removed because the
3 Defendant was not involved in the murder conspiracy and
4 could not truthfully admit such a crime during the guilty
5 plea proceedings.
6

7 The Defendant admitted in the factual basis to the
8 crime of conspiracy to assault or murder S.L. in the jail.
9 S.L. had shot her son Fred in the leg and the Defendant was
10 angry and wanted S.L. punished for hurting her son. S.L.
11 was eventually assaulted in the jail, but it was not a life
12 threatening injury. Co-Defendant, Jose Montano, has
13 pleaded guilty to the assault and this Court sentenced him
14 to 24 months. PSR, p. 7. para. 21.

16 As a part of the plea negotiations, the Defendant
17 agreed that the conspiracy to assault S.L. could potentially
18 have resulted in death and therefore Defendant agreed the
19 Level 33 Guidelines for Conspiracy to commit Murder. The
20 Defendant did not agree to the Conspiracy to Murder C.V.
21 In other words, the Government got the Level 33 murder
22 Guidelines and the Defendant got the C.V. murder conspiracy
23 removed.
24

25 The probation report correctly summarizes the roles
26 of the actual C.V. kidnappers and murder conspirators.
27 C.V., Carlos Gonzalez, and Juan Sanchez, were involved in
28

1 check fraud, identity theft, and counterfeiting. There was
2 a falling out amongst them and C.V. was held for several
3 weeks by Carlos Gonzalez and Juan Sanchez. During that time
4 they had tried to extort money from her. It was the
5 prosecution's theory that Gonzalez and Sanchez wanted to
6 kill C.V. because she knew too much about their criminal
7 activities. R.R. a friend of C.V. alerted the police.

8 C.V. was rescued by the police from a car. C.V.
9 had been handcuffed and threatened with a gun by Gonzalez
10 and Sanchez, who were in the car, along with R.R.
11 Gonzalez and Sanchez were charged and convicted of kidnaping
12 C.V. in State Court. At the preliminary hearing, C.V. and
13 R.R. testified against Gonzalez and Sanchez and never
14 mentioned any involvement by the Defendant in the crime.
15

16 That is where the case stood, until sometime later,
17 a confidential informant with gang ties claimed the Defendant
18 was at a meeting where she authorized the murder. This the
19 Defendant adamantly denies. Ironically, the Probation
20 Officer states in his report that he "has no information
21 regarding the victim of the conspiracy to murder, C.V." PSR,
22 p. 12, para. 80. According to the discovery, C.V. has never
23 claimed that the Defendant had anything to do with her
24 mistreatment by Gonzalez and Sanchez.
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In conclusion, the Court should not increase the Defendant's offense level for victim restraint or for aggravated role in the offense. The C.V. murder conspiracy should not be included in the PSR as relevant conduct of the Defendant. For argument sake, a 2 level increase for role in the offense may be possible, but certainly not a 3 level increase. With a 2 level role increase, the final offense level is level 32 with a sentence range of 121 to 151 months. Without a role increase, the offense level is level 30 with a sentence range of 97 to 121 months.

Either calculation puts the RICO charge within the 120 months range, which mirrored the 120 months for the 924c charge, and explains why the Defendant had a reasonable expectation, under the First Plea Agreement, that she could argue for a total concurrent sentence of 120 months.

SENTENCE RECOMMENDATION

As noted in the Introduction, the Defendant asks the Court to sentence her to a sentence of no more than 121 months or 10 years and 1 month, consisting of 1 month on Count 1 and a consecutive 120 months on Count 13. This is adequate punishment for her crime. Based on her age (58),

1 no more is necessary. Upon her release, she will desire no
2 more than to return to being a mother and grandmother, a role
3 she was fulfilling at the time of her arrest two years ago in
4 2018.

5
6
7 Dated: November 12, 2020

Respectfully Submitted,

8 /s/ Joseph F. Walsh
9 JOSEPH F. WALSH
10 Attorney for Defendant
11 JESSIE JUAN LEON
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action; my business address is 205 S. Broadway, Suite 606, Los Angeles, California 90012.

On November 12, 2020, I served the foregoing document described as **DEFENDANT PEREZ-CASTANEDA'S POSITION OF THE PARTIES RE: SENTENCING** on interested parties in this action by email:

MAX B. SHINER
ASSISTANT U.S. ATTORNEY
max.shiner@usdoj.gov

SCOTT SHAFER
U.S. PROBATION OFFICER
scott.shafer@cacp.uscourts.gov

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 12, 2020 at Los Angeles,
California.

/s/ Joseph Walsh
JOSEPH WALSH